Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID LANZOTTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a conviction for aiding and abetting a state law offense under 18 U.S.C. §2 when such a conviction criminalizes conduct not made criminal under state law comports with the outer limits of Congressional Power, particularly when such convictions potentially convert state misdemeanors into federal felonies?

II. Whether the constitutional right to due process is offended by a complete absence of adequate justification for a restitution order of $500,000 in the context of a modest earnings record and assets of Mr. Lanzotti for an income tax violation of another person when none of the unreported income from alleged gambling activity was either alleged to have gone to Mr. Lanzotti either by the indictment, trial testimony or the Presentence Report?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Lanzotti, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on February 15, 2000 appears as *Lanzotti v. United States*, 205 F.3d 951 (7th Cir. 2000) and is attached as App. 1. The unreported judgment and opinion of the district court is attached as App. 12.

STATEMENT OF JURISDICTION

The judgment and opinion of the Seventh Circuit, affirming a judgment and order of the United States District Court for the Central District of Illinois, was entered on February 15, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 10 (a) and (c).

Jurisdiction in the United States District Court was pursuant to 18 U.S.C. §§371, & 1955, and 18 U.S.C. §3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291, and 18 U.S.C. §3742.

A notice of appeal in this case was filed on July 6, 1998 with the Clerk of the District Court from, and after, a

final judgment ordered June 29, 1998 and entered on the docket on June 30, 1998.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Eighth Amendment to the United States Constitution provides in relevant part:

Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and excessive punishments inflicted.

STATEMENT OF THE CASE

Petitioner, David Lanzotti, was convicted under 18 U.S.C. §1955 in a second jury trial in the United States District Court for the Central District of Illinois of aiding and abetting a state gambling law violation through 18 U.S.C. §2 and in a first trial of conspiring to assist Ted Furkin in income tax law violations in relationship to Allstar Music, Inc. in violation of 18 U.S.C. §371.

Ted Furkin was the owner and sole shareholder of Allstar Music, Inc. Mr. Lanzotti neither owned Allstar Music, Inc., nor derived any other benefit from said enterprise other than his normal monthly salary.

Mr. Lanzotti commenced work in the early 1980s for Ted Furkin as a person who moved various coin operated machines such as pool tables and vending machines. The alleged illegal gambling business involved Allstar Music, Inc. and involved placing various video games such as poker machines, or cherry machines in bars or clubs. The owners of such bars or clubs would pay out cash to patrons who accumulated large numbers of free games on the registers of such machines. Allstar Music, Inc. customarily received half of the operating profits on such machines and allegedly did not report this income in its tax returns. These machines had affixed to them Illinois tax stickers indicating that various fees had been paid to the State of Illinois.

The indictment did not allege that any of the unreported income that Allstar Music, Inc. or Ted Furkin allegedly derived from illegal gambling activities went to Mr. Lanzotti. Neither at trial nor in the Presentence Report for Mr. Lanzotti was it alleged that any of the unreported income went to Mr. Lanzotti.

At a first trial in 1995 Mr. Lanzotti was convicted of conspiring with Mr. Furkin under 18 U.S.C. §371 for this unreported income. A new trial was ordered on the state law related gambling charges.

At the second trial on the gambling charge alone, Mr. Lanzotti was again convicted along with co-defendant Connie Hughes.

Mr. Lanzotti was sentenced to a total term of 120 months in prison. On each substantive offense the maximum sentence was 60 months. The Court thus made the sentences consecutive. No fine was ordered to be paid

because of inability to pay. The potential fine range was from $12,500 to $125,000.

Mr. Lanzotti was ordered, however, to make restitution of $500,000 to the internal revenue service. At sentencing it appeared not only that modest assets owned by Mr. Lanzotti's wife were being considered as possible sources of restitution, and that her even more modest income was included in the consideration of the court. No determination was made that Mr. Lanzotti had any realistic possibility of paying any substantial part of $500,000 in restitution. The district court imposed the restitution order because "you [David Lanzotti] were his right hand man and made his collections and picked it up and knew from A to Z what was going on."

About a half dozen persons collected for Allstar. Neither the accountant for Allstar nor the person who prepared the corporate income tax returns for Allstar testified that David Lanzotti had anything to do with either accounting or income tax return preparation. All money was turned into a count room, to which David Lanzotti had no key. David Lanzotti had nothing to do with the operations of the office. The record [in both trials] was devoid of testimony that David Lanzotti knew whether Allstar or Ted Furkin were not reporting any income.

A principal argument before the court of appeals was that Mr. Lanzotti was convicted for aiding and abetting a non-existent state criminal offense, i.e., aiding and abetting the aiding and abetting of a gambling offense when Illinois law did not make such aiding and abetting a criminal offense. It was suggested that it was up to the

state to define the underlying crimes according to its own conceptions of culpable conduct.

There was no dispute that 18 U.S.C. §1955 references state law, but Mr. Lanzotti contended on appeal that it references state law that does not exist in the instant case. 18 U.S.C. §1955 provides in pertinent part as follows:

> §1955. Prohibition of illegal gambling businesses
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section –
>
> (1) "illegal gambling business" means a gambling business which –
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;

Illinois law contains no crime of aiding and abetting a gambling violation. Section 18 U.S.C. §1955 does not in terms indicate that a state law violation can be supplemented by violation of 18 U.S.C. §2 (a statute which contains no commerce clause related element). In so far as any Illinois Statute was on point, that statute was 720 ILCS 5/28-1(a)(3).

> §28-1. Gambling.
>
> (a) A person commits gambling when he:
>
> . . . .
>
> (3) Operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or

> lease of, manufactures or distributes any gambling device; . . .
>
> . . . .

Illinois statute 720 ILCS 5/28-2(a)(1) states that the Illinois definition of gambling device does not include:

> A coin in the slot generated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no money, property or right to receive money or property."

None of the machines at issue in the instant case returned any money to players.

A reasonable person might conclude knowing of the existence of Illinois Tax Stamps affixed to such machines, and the absence of any mechanical method of dispensing payments, that any gambling required an agreement between the owner of a bar and a patron, but was not intrinsic to the machines in this case, and that such machines were legal. In fact all payoffs required the bar owner's action. The record is devoid of any testimony that David Lanzotti encouraged any bar owner to gamble with patrons.

The government's theory was that Mr. Lanzotti aided and abetted the violation of Illinois criminal law. The jury was not instructed as to the content of 720 ILCS 5/28-2-(1) as stated above. Instead the jury was charged as set out on page 5 of the court of appeals' decision as if aiding and abetting was criminalized by Illinois law

through the Illinois law on accountability. A pattern instruction on accountability was given and a pattern instruction on Federal aiding and abetting law, as if the federal aiding and abetting statute applied. The pattern instruction on federal aiding and abetting law replaced the Illinois accountability language requiring "intent to promote" with knowingly association with the criminal venture.

The court of appeals determined that the jury was clearly informed correctly about aiding and abetting (p. 5 opinion) and affirmed the conviction – although Illinois law of accountability contains the additional element of intent to promote. It was suggested by Mr. Lanzotti that a person might knowingly associate himself without the intent to promote the commission of an offense, but the court of appeals failed to address the distinction.

The Illinois Supreme Court has indicated that "A charge based on accountability must necessarily flow from the principal crime at issue. Accountability is not in and of itself a crime." *People v. Hicks*, 181 Ill. 2d 541, 547 (1998). It was suggested that Mr. Lanzotti did not play a game of chance or skill for money. Neither did he operate, keep, own, purchase, exhibit, rent, sell, bargain for the sale or lease of, manufacture or distribute any gambling device – which are the elements required from gambling under 720 ILCS 5/28 It was suggested by Mr. Lanzotti that prior to the trial of this case, there was a complete lack of notice under the complex law of Illinois accountability regarding gambling offenses that the machines implicated in the instant case could produce

criminal culpability for what Mr. Lanzotti did. Such failure of clear notice that activity was criminal was suggested to be a fundamental defect of constitutional magnitude under the due process clauses of the Fifth and Fourteenth Amendments.

As a practical matter, the confusion about the legal status of the machines at issue in this case was rampant in Illinois practice. Such machines were not only licensed by state license stickers, and many of the bar owners testified that they continued to operate such machines even after the initial "raids."

When an Illinois State's Attorney cannot know what a criminal offense is under the law involved in the instant case, see *Bojac's, Inc. v. William R. Haine, State's Attorney of Madison County, Illinois,* 98 MR 409 (Ill. Cir. Ct. 1999), (continued in the appendix, at 19) to expect Mr. Lanzotti, a layperson to know, was absurd.

The convictions and sentence were affirmed on appeal, *Lanzotti v. United States,* 205 F.3d 951, and is contained in the appendix.

REASONS FOR GRANTING THE WRIT

This case first presents an important question about the propriety of employing federal aiding and abetting statutes and instructions to incorporate conduct as criminal under federal law that is not clearly criminal under state law. State law doctrine of accountability and federal law regarding aiding and abetting are not identical. Yet 18 U.S.C. §1955 makes into a federal criminal violation

activity that allegedly violates state criminal law without requiring that the state violation be a felony. The danger of such actions includes serious potential for federal courts misunderstanding the nuances of state criminal law, particularly when the complex nature of aiding and abetting and/or accountability law is involved. Only one reported Illinois case could be located that came anywhere near indicating that Illinois law criminalized conduct related to that Mr. Lanzotti was accused of committing. That case, *People v. Donatelli*, 176 Ill.App.3d 1086 (3rd Dist. 1988) involved a fine of $100 and court costs. Application of federal law in the instant case involves five additional years of custody. In *Donatelli* the defense was that the offense of gambling was committed in the mere presence of Donatelli – the appellate court rejected that defense on the basis of the common law record and a four page statement of agreed facts. It was agreed that the defendant was present at a dice game in a cellar, with the court rejecting a defense of "pretend craps." In the instant case no testimony indicated that Mr. Lanzotti was present when gambling occurred.

The case presents thus a very important issue of the adequacy of notice of the applicability of federal law, and the potential applicability of 18 U.S.C. §2 to broad ranges of conduct, not only in the gambling area, but also to all state criminal law where doctrines related to aiding and abetting might be implicated. This court has indicated that Congress has no general criminal jurisdiction power. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 98 (1997).

If Congress authorized the application of its general aiding and abetting statute, 18 U.S.C. §2, to aiding and

abetting any substantive state criminal offense, the citizens ought to know that and not be forced to guess correctly at risk to their liberty. The intensive nature of the appropriate inquiry is suggested by such cases as *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) which discussed the "illogical result" of converting a state misdemeanor into a federal felony. Yet that appears virtually to have been done in the instant case. Compare, *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 178 (6th Cir. 1992) (Awareness of the illegality requires that an underlying illegal act occur – problem of combining the crime of conspiracy, which does not require proof of the underlying substantive offense, with an aiding and abetting offense, which doesn't exist without one.)

The second question, while not as important in a practical sense, given that few restitution orders of the magnitude in the instant case ever are complied with, nevertheless presents an important question of federal law. Just as ability to pay in the future criminal fines, the ability to pay restitution, should be analyzed for excessiveness:

> "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609-610, 113 S.Ct. 2801, 2805-2806, 125 L.Ed.2d 488 (1993) (emphasis and internal quotation marks omitted); accord, *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989) ("[A]t the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a

> sovereign as punishment for some offense"); id., at 265, n. 6. The in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine.". . . . Accordingly, the forfeiture in this case should be analyzed under the Excessive Fines Clause. *Alexander v. United States*, 509 U.S. 544, 558, 113 S.Ct. 2766, 2775 (1993)

Compare, *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) (state court cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay).

In the instant case neither the district court nor the court of appeals discussed ability to pay. While the government argued in the court of appeals that Mr. Lanzotti's wife's income of $200 net monthly cash flow supported the restitution argument, it was Mr. Lanzotti, not his wife who was convicted.

CONCLUSION

Wherefore, Petitioner, David Lanzotti, respectfully requests this court to grant the writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 98-2728 & 98-2750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID LANZOTTI and CONNIE L. HUGHES,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94-CR-30014—**Richard Mills**, *Judge*.

ARGUED OCTOBER 27, 1999—DECIDED FEBRUARY 15, 2000

Before BAUER, COFFEY, and EASTERBROOK, *Circuit Judges*.

BAUER, *Circuit Judge*. David Lanzotti ("Lanzotti") and Connie L. Hughes ("Hughes") were found guilty of participating in an illegal gambling business in violation of 18 U.S.C. § 1955. Lanzotti was also convicted of conspiracy, 18 U.S.C. § 371, in the first trial of this case. *United States v. Lanzotti*, 90 F. 3d 1217 (7th Cir. 1996). Both now appeal their convictions and sentences.

I. Background

For approximately 10 years, Lanzotti and Howard Furkin ("Furkin"), under the guise of a legitimate business

called Allstar Music, Inc. ("Allstar"), operated a large scale gambling business. Allstar, owned by Furkin, leased amusement machines to bars and service clubs. Lanzotti originally persuaded Furkin to enter into the gambling business in which Furkin, using fictitious names, purchased video and poker machines with cash. These cash purchases were not reported to either the Internal Revenue Service or to Allstar's own accountants. The machines were then converted into gambling devices and placed in various bars and taverns in which they had already established a connection. The bars would pay the winning patrons and then split the profits with Allstar.

By 1992 Allstar had close to 250 gambling machines in approximately seventy-five locations with an average weekly income that varied between several hundred dollars to as much as three thousand dollars per bar. Lanzotti and Hughes were responsible for servicing the machines and collecting the profits. Hughes only worked as an employee of Allstar for approximately two years but continued to work as Lanzotti's assistant in the gambling business. They were the primary contacts between the bar owners and Allstar. Lanzotti also owned one of the bars and on at least one occasion dealt directly with a gambling customer's payoff dispute.

Neither Lanzotti nor Furkin reported the income they received from the gambling machines to the Internal Revenue Service. In fact, they encouraged bar owners to lie about how much money they had received from the gambling machines. To protect themselves from the IRS, Lanzotti and Furkin entered into backdated lease agreements with the bar owners to purposefully misrepresent the income received from the machines. In these fictitious lease agreements, bar owners paid a flat rate, which was less than half the gross earnings, for the machines each week.

On January 18, 1995, a jury convicted Lanzotti and Hughes and other defendants for violating 18 U.S.C. § 1955. Lanzotti was also convicted of conspiracy. On June

8, 1995, the district court granted a new trial with respect to the gambling charge for Lanzotti and Hughes because the jury instructions inadequately described the aiding and abetting theory to the jury. Lanzotti and Hughes moved to prevent the retrial based on double jeopardy grounds. The district court denied their motion and this Court of Appeals affirmed that decision. *United States v. Lanzotti,* 90 F.3d 1217 (7th Cir. 1996).

Lanzotti and Hughes were retried on the gambling charge and on February 11, 1998, were again found guilty. A joint sentencing hearing was held for both defendants on June 29, 1998. Lanzotti, with a two-level enhancement for obstruction of justice, was sentenced to 120 months incarceration followed by three years of supervised release, and ordered to pay $500,000 in restitution to the Internal Revenue Service. Hughes, with a three-level enhancement for her supervisory role in the business, was sentenced to twenty months incarceration followed by three years of supervised release. She has served her time and has been released from custody.

Lanzotti and Hughes appeal their convictions and sentences.

II. Lanzotti's and Hughes' Conviction

A. Aiding and Abetting Instruction

The defendants appeal their convictions on the grounds that aiding and abetting a state gambling law violation fails to satisfy the federal gambling statute's (18 U.S.C. § 1955) requirement that the gambling business violate state law.

We review the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the Government, and we will affirm if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Jackson,* 103 F.3d 561, 567 (7th Cir. 1996). Only when the

record contains no evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt will a jury verdict be overturned. *United States v. Furkin*, 119 F.3d 1276, 1280 (7th Cir. 1997).

Section 1955 makes it a crime for whoever conducts, finances, manages, directs, or owns all or part of an illegal gambling business. 18 U.S.C. § 1955 (a). In order to establish a violation under 18 U.S.C. § 1955, the government must prove the existence of an illegal gambling business. One requirement is for the government to establish that the business violated a law of the state in which it was conducted. 18 U.S.C. § 1955(b)(1)(i). The indictment in this case charged the defendants with violating Illinois law 720 ILCS 5/28-1. Subsection (a)(1) of this provision provides that a person commits the offense of gambling when he "[p]lays a game of chance or skill for money or other thing of value." 720 ILCS 5/28-1(a)(1). Subsection (a)(3) provides that a person commits the offense of gambling when he "[o]perates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device." 720 ILCS 5/28-1(a)(3).

Lanzotti argued that the use of the aiding and abetting theory in connection with a state law violation created a new offense. This court, in affirming the district court, disagreed and stated that the indictment and the prosecution's factual theory of the case described a violation of state law under the aiding and abetting and (a)(3) theories but was insufficient under (a)(1). *United States v. Lanzotti,* 90 F.3d 1217, 1224 (7th Cir. 1996). Although the jury was given the aiding and abetting instruction, the district court granted a new trial because it was not "fully and fairly communicated by the jury instructions." *Id.*

In the new trial, the government established that by providing the bars with the machines to be played, Lanzotti and Hughes aided and abetted the patrons playing games of chance for money. The jury was then instructed with Illinois Pattern Jury Instruction 5.03 which states:

> A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.

The instruction was not objected to by the defendants, therefore it is reviewed under a plain error standard. *United States v. Brothers,* 955 F.2d 493, 496 (7th Cir. 1992).

Under federal law, the crime of aiding and abetting requires knowledge of the illegal activity that is being aided and abetted, a desire to help the activity succeed and some act of helping. *United States v. Garcia,* 45 F.3d 196, 199 (7th Cir. 1995). The jury was instructed with this court's pattern Instruction 5.08 which states:

> Any person who knowingly aids, abets, counsels, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it, and try to make it succeed.

In evaluating the merit of challenged jury instructions to which objections were properly raised in the proceedings below, we review the charge in its entirety and ascertain whether the jury was misled in any way and whether it had an understanding of the issues and its duty to determine those issues. *United States v. Boykins*, 9 F.3d 1278, 1285 (7th Cir. 1993); *United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994). If the instructions are adequately supported by the record and are fair and accurate summaries of the law, the instructions will not be disturbed on appeal. *Id.* In this case, the instructions clearly informed the jury correctly about aiding and abetting and no error occurred.

B. Expert Witness

Lanzotti and Hughes further argue that the district court abused its discretion in refusing to allow their expert witness, James Jordan, to testify. Rule 702 establishes two admissibility requirements for expert testimony: (1) the expert must be qualified, and (2) the subject matter of the expert's testimony must consist of specialized knowledge that will be helpful or essential to the trier of fact in deciding the case. *United States v. Buscaglia*, 25 F.3d 530, 533 (7th Cir. 1994); *United States v. Stevenson*, 6 F.3d 1262, 1266 (7th Cir. 1993); Fed.R.Evid. 702. A court has wide discretion in determining the competency of a witness as an expert and the relevancy of his testimony with respect to a particular subject. The district court's decision will be overturned on appeal only if manifestly erroneous. *Stevenson*, at 1267.

In this case, the district court denied the defendants' motion to establish Jordan as an expert. The defendants did not provide the court with any information regarding Jordan's resume, curriculam vitae, or credentials that would qualify him as an expert in the area of gambling. In fact, Jordan works for the Illinois Liquor Control Commission which regulates liquor, not gambling, and is not qualified to render an expert opinion on whether or not Cherry Master and Poker machines are illegal. The district court did not abuse its discretion in denying defendants' motion to supplement their witness list.

III. Lanzotti's Sentence and Restitution

A. Sentence

Lanzotti appeals the two-level enhancement of his sentence for obstruction of justice. He contends that the court double counted when it used the same conduct to establish his conspiracy offense to justify the enhancement for obstruction of justice.

We give great deference to a sentencing court's determination that a § 3C1.1 enhancement is appropriate. *United States v. Hickok*, 77 F.3d 992, 1007 (7th Cir. 1996). Indeed, we will overturn a factual finding in the sentencing context only if our review of the record leaves us with "a definite and firm conviction that a mistake has been committed." *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

Section 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense, increase the offense level by 2 levels.

USSG § 3C1.1

Application Note 7 to § 3C1.1 provides that an adjustment may be made if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself.

Lanzotti's contention that the court double counted is not supported by the record. In fact, this court has previously held that, while some overlap will occur concerning the evidence of obstruction as it relates to the various enhancements and the departure, each represent different considerations under the Guidelines. *Furkin*, 119 F.3d 1276, 1284. In other words, the different guidelines address different concerns relating to a defendant's obstructive conduct. *Id.* Additionally, both the application notes to § 3C1.1 and this Court's case law make it clear that improperly attempting to influence a witness (including by counseling a potential witness to make false statements to investigating authorities) indeed qualifies as obstruc-

tion of justice under U.S.S.G. § 3C1.1. *United States v. Friend,* 104 F.3d 127, 131 (7th Cir. 1997).

In this case, the court found that the defendant created false documents to conceal the true nature of his gambling operations, including backdating leases, and his conduct was extensive and pervasive. The court further found that when Lanzotti became aware of the IRS investigation, he tried to influence witness testimony. He encouraged the various bar owners, including David Hampsten, to lie about their payment arrangement with Allstar. To reduce his expenses, Lanzotti wanted them to say they paid a flat rate for the machines instead of splitting the profits. Regardless of the payment arrangement, the income was never turned into Allstar or recorded, unlike the income from their non-gambling machines. These findings are clearly consistent with Application Note 7's discussion of obstruction. Lanzotti's two-level enhancement was warranted.

B. Restitution

Lanzotti argues that there was inadequate justification for the sentencing court to order restitution without citing any legal authority in support of his contention. We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues). *United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir. 1991); See, e.g., *United States v. Brown,* 899 F.2d 677, 679 n. 1 (7th Cir. 1990); *United States v. Petitjean,* 883 F.2d 1341, 1349 (7th Cir. 1989); *United States v. Williams,* 877 F.2d 516, 518-19 (7th Cir. 1989); Fed.R.App.P. 28(a)(4). A party urging us to reverse a district court's judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument. See *Brown,* 899 F.2d at 679 n. 1; see also *Beard v. Whitley County REMC,* 840 F.2d 405, 408-09 (7th Cir. 1988). "The

premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). It is not this court's responsibility to research and construct the parties' arguments. *Williams*, 877 F.2d at 518; *Beard*, 840 F.2d at 408-09.

Lanzotti does not provide this court with any evidence that the sentencing court abused its discretion in ordering restitution. *Berkowitz*, 927 F.2d 1376, 1384. The Guidelines contemplate full restitution whenever possible and the defendant must establish that full restitution is unwarranted under the circumstances to reduce or alleviate that obligation. *United States v. Brown*, 47 F.3d 198, 206 (7th Cir. 1995); 18 U.S.C. § 3663(a)(2) (Victim and Witness Protection Act of 1982 (VWPA)). In other words, the burden is on the defendant to show why restitution is unwarranted. The lack of documentation that Lanzotti benefitted from the unreported income is beside the point. Lanzotti, as a member of the conspiracy, is liable for the actions of his coconspirator, which includes restitution where appropriate. *United States v. Brewer*, 983 F.2d 181, 205 (10th Cir. 1993); *United States v. Chaney*, 964 F.2d 437, 452-53 (5th Cir. 1992).

IV. Hughes' Sentence

Hughes argues that the district court erred in imposing a three-level enhancement in connection with her gambling conviction. The court found that Hughes acted as a manager or supervisor as defined under U.S.S.G. § 3B1.1 (b) of the sentencing guidelines. This finding lacks a factual predicate and constitutes clear error. The fact that Hughes was Lanzotti's girlfriend and a participant in the collection does not render her a manager or a supervisor. She was not an employee of All-Star, she never received a paycheck, and only went to the office occasionally on her

own. Hughes' sentence is vacated and remanded to the district court for the limited purpose of re-sentencing Hughes without the three-level enhancement for being a manager or supervisor.

All other points and arguments either have been waived or are without merit.

VI. Conclusion

For the foregoing reasons Lanzotti's conviction and sentence and Hughes' conviction are affirmed. Hughes' sentence is vacated and remanded for re-sentencing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 15, 2000

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Nos. 98-2750 & 98-2728

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

CONNIE L. HUGHES and DAVID LANZOTTI,
Defendants – Appellants

Appeals from the United States District Court for the Central District of Illinois, Springfield Division No. 94 CR 30014, Richard Mills, Judge

The conviction and sentence of Lanzotti and Hughes' conviction are AFFIRMED. Hughes' sentence is VACATED and REMANDED for re-sentencing. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

United States District Court

Central District of Illinois

UNITED STATES OF AMERICA
v.
DAVID J. LANZOTTI

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
3:94CR30014-003

(Jun. 30, 1998)

Michael Metnick
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) which was accepted by the court._____

[X] was found guilty on count(s) after a plea of not guilty. **1 & 2 of the Superseding Indictment**

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1955	Illegal Gambling Business	06/30/1994	1
18 U.S.C. § 371	Conspiracy to Defraud the Internal Revenue Service	06/30/1994	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 356-38-6073

Date of Imposition of Judgment 06/29/1998

Defendant's Date of Birth: 06/16/1946

Defendant's USM No.: 10217-026

Defendant's Residence Address: 10 Hollybrook Drive
Springfield IL 62702

Defendant's Mailing Address: 10 Hollybrook Drive
Springfield IL 62702

/s/ Richard Mills
Signature of Judicial Officer
RICHARD MILLS
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

06/30/1998
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 month(s).

This term consists of 60 months on Count 1 and 60 months on Count 2, to be served consecutively.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

  [ ] at ____ a.m./p.m. on _____.

  [ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

  [X] before 2 p.m. on 07/29/1998.

  [ ] as notified by the United States Marshal.

  [ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s). This term consists of 3 years on each of Counts 1 & 2 to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test with 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substanc4es are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer access to any requested financial information including both business and personal income tax returns.

2. The defendant shall, at the direction of the probation officer, participate in a program for substance abuse treatment/counseling including testing to determine whether he has used controlled substances and/or alcohol. During the entire term of supervision, defendant will abstain from the use of alcohol, all other legally obtainable intoxicants, and all mood-altering substances unless prescribed by a physician. The defendant shall pay for these services as directed by the probation officer.

3. The defendant shall not own, purchase, or possess a firearm, ammunition, or other dangerous weapon.

4. The defendant shall, at the direction of and in the discretion of the U.S.Probation Office, reside for up to 20 days in community confinement to commence on a date and at a facility designated by the Bureau of Prisons and shall abide by the rules of that facility.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**	**$**	**$ 500,000.00**

[ ] If applicable, restitution amount ordered pursuant to plea agreement. . . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended judgment in a Criminal Case will be entered after such determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Internal Revenue Service	$2,149,338.00	$500,000.00	
Totals:	$2,149,338.00	$500,000.00	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $_____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[X] Joint and Several

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount
3:94CR30014-002	Howard "Ted" Furkin	$500,000.00

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Court National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See attached order.

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: III

Imprisonment Range: 97 to 120 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 12,500.00 to $ 125,000.00

[ ] Fine is waived or is below the guideline range because of inability to pay.

Total Amount of Restitution: $ 2,149,338.00

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of

a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

BOJAC'S, INC., Plaintiff,	)	98-MR-409
v.	)	
WILLIAM R. HAINE, STATE'S ATTORNEY OF MADISON COUNTY, ILLINOIS, Defendant.	)	

ORDER

(Filed Febr. 5, 1999)

This Court, in reaching the below-stated ruling, has considered the sworn testimony at hearing and exhibits admitted into evidence and the Memorandums of Law with attachments submitted by both parties. The court has further thoroughly reviewed the relevant provisions contained in 720 ILCS 5/28-2 and 720 ILCS 5/28-5.

This Court agrees with the statement of State's Attorney Haine that the notoriety of the Thomas Venezia and Amiel Cueto federal cases focused public attention upon video-gambling devices. (Defendant's Memorandum, page 2) This Court further believes the State's Attorney, William R. Haine, properly took the position that his position as State's Attorney was not only to prosecute criminal offenses after crimes were allegedly committed, but also to take necessary steps, when possible, to deter criminal activity. This court truly believes that Mr. Haine is properly attempting to protect not only the general

public but also the liquor license holders owning poker machines as well from possible prosecution. Accordingly, this Court further agrees with Mr. Haine that "the issuance of the Protocol is clearly a part of the obligation and duties of the State's Attorney . . . " (Defendant's Memorandum, page one (1) and that " . . . the Court must give deference to the State's Attorney's duty to properly advise and instruct the police." (Defendant's Memorandum, page seven (7)) That, in fact, states the real issue in this case, to-wit: Does the Protocol "properly" advise and instruct the police.

This Court does not agree with the State's position that "It is highly questionable and there appears to be no authority to support the plaintiff's claim that this Court can apply a standard to this Protocol that would otherwise be used to assess a statute's validity. The Protocol does not carry the force of law but is merely instructive to the police departments as to the State's Attorney's opinion." (Defendant's Memorandum, page 4) And that "It is also highly questionable whether this Court can interfere in the executive function to advise the local police department" and "therefore, this Court has no basis nor authority to rule that this Protocol is unconstitutional."

What this position fails to recognize is that valuable property and personal liberty questions are at issue now. Because of the Protocol, video machines have been seized or otherwise removed from proprietors' establishments. Further, because of the Protocol, decisions whether to arrest persons for use or possession of the machines in question is, and remains, a constant, imminent possibility.

This Court disagrees with the general position of plaintiff BOJAC's, Inc. that " . . . this Protocol is vague, ambiguous and uncertain . . . " (Plaintiff's Memorandum, page 6) What the Protocol states is clear to both the police and the public.

However it is clear, as plaintiff states at page 3 of its Memorandum, that "The Protocol largely restates the law as stated in the criminal gambling statute and extrapolates and interprets that statutory law and case law to provide a guide to police investigative authorities for the enforcement of the criminal gambling statute." The problem with the Protocol is that, though it gives definition and guidance as to what the elements of a gambling machine might be, it completely fails to mention or give guidance as to what a "gambling device" is not as set forth in 720 ILCS 5/28-2(1) and 720 ILCS 5/28-5(a).

Specifically, Section 5/28-2(1) states that a "gambling device," does not include

> "(1) A coin in the slot generated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no money, property or right to receive money or property."

Section 5/28/5(a) provides that a "gambling device" is defined in part as "every device designed for gambling which is incapable of lawful use." As the Protocol makes no provision for the determination by law enforcement as

to what is not a gambling device, it is invalid and is not "proper."

Mr. Oller testified that as the owner of this machine, he never paid off winners on his machine, and no one asked to be paid off. He testified that the machines were used for amusement only. The point is this machine and similar video-poker machines, which are coin operated, can be played for amusement only, and if they are so used for amusement only, they qualify as an exception to a "gambling device" as defined in Section 5/28-2 (a)(1) and 5/28-5(a).

Consequently, this court finds that the Protocol is legally deficient and cannot be used for per se prosecution and seizure of owners and users of such video-poker machines.

Riverboat gambling certainly has many safeguards that are not available to the general public when using video machines on dry land, such as, the regulation to pay out percentages by the Gaming Commission. However, these safeguards are provided by the Legislature, who certainly has the power to expand the safeguards to other forms of entertainment. It is not for this Court to do so.

Having now ruled on the issues presented to this Court, the following is Dicta. As stated above, this Court believes that Mr. Haine was acutely aware of the Venezia-Cueto case and was attempting to ward off criminal activity before prosecution was necessary. Mr. Haine is to be commended for this. The problem is that the legislature has provided for the exceptions stated in 5/28-2(a)(1) and 5/28-5(a), and the citizens have the right to avail

themselves of these legislative exceptions. No one should interpret this Order as a right to engage in illegal gambling with video-poker machines. This Court recognizes, as stated above, that video-poker machines can be used for amusement only. This Court also recognizes from the testimony, and Memorandums presented by both parties at this trial, that video-poker machines can also be used for illegal gambling. It seems to this Court that it would be relatively easy for law enforcement to do an undercover sting operation to ferret out any illegal gambling, if any, in Madison County using video-poker machines.

Those who may be predisposed to engage in such illegal gambling have been adequately warned by the State's Attorney's Office and do so at their own legal peril.

Regardless, for the reasons stated above, plaintiff prevails in his Petition for Declaratory Judgment. The Protocol, as it now stands, is legally deficient.

Clerk to send copy of Order to counsel of record.

ENTERED THIS 5th DAY OF FEBRUARY 1999.

/s/ Lewis E. Mallott
Lewis E. Mallott
Associate Judge